No. 77-1686

In the Supreme Court of the United States

OCTOBER TERM, 1978

LEO SHEEP COMPANY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES

WADE H. MCCREE, JR.
Solicitor General

JAMES W. MOORMAN
Assistant Attorney General

STEPHEN R. BARNETT
Deputy Solicitor General

SARA SUN BEALE
Assistant to the Solicitor General

PETER R. STEENLAND, JR.
RAYMOND N. ZAGONE
EDWARD J. SHAWAKER
CHARLES E. BIBLOWIT
Attorneys
Department of Justice
Washington, D.C. 20530

INDEX

CITATIONS

Cases—Continued

Cases—Continued

Statutes:

Miscellaneous: Page

Miscellaneous—Continued Page

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OPINIONS BELOW

The opinions of the court of appeals (Pet. App. vi to xxvii) are reported at 570 F.2d 881. The district court's findings of fact and conclusions of law (Pet. App. i to v) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on May 17, 1977, and a petition for rehearing was denied on February 28, 1978. The petition for a writ

of certiorari was filed on May 26, 1978, and was granted on October 2, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the United States reserved a right of access to the retained even-numbered sections of land when it granted the Union Pacific Railroad title to the odd-numbered sections completely surrounding the even-numbered sections.

STATUTES INVOLVED

Sections 3 and 4 of the Act of July 1, 1862, ch. 120, 12 Stat. 492; Section 4 of the Act of July 2, 1864, ch. 216, 13 Stat. 358; and the Unlawful Inclosures of Public Lands Act of 1885, ch. 149, 23 Stat. 321, as amended, 43 U.S.C. 1061-1066, are reprinted at Pet. App. xxviii to xxxii.

STATEMENT

Petitioners are the owners of certain odd-numbered sections of land in Carbon County, Wyoming, which were originally granted by Congress to the Union Pacific Railroad pursuant to the Act of July 1, 1862 (the Union Pacific Act), ch. 120, 12 Stat. 492, as amended by the Act of July 2, 1864, ch. 216, 13 Stat. 358 (Pet. App. ii). Petitioners' sections alternate in checkerboard fashion with the even-numbered sections of land that were retained in the public domain

(*ibid.*).[1] Petitioners also use the even-numbered publicly owned sections for grazing and pasture, pursuant to permits issued under Section 3 of the Taylor Grazing Act, ch. 865, 48 Stat. 1270, as amended, 43 U.S.C. 315b (Pet. App. ii). No fences separate petitioners' sections from the sections that are public domain (*ibid.*).

In 1938, the Bureau of Reclamation built the Seminoe Reservoir on public lands to the west and south of petitioners' lands, and the reservoir and adjacent public lands have been used by the public for hunting and fishing for many years (Pet. App. vii). In recent years, however, the government began to receive complaints that the public was being denied access to the reservoir area or being required to pay for such access (*ibid.*) Because of the checkerboard pattern of private and public land holdings, it is impossible to reach the reservoir from this direction without crossing some corner of privately owned land (see the map at Pet. App. xviii).

The Department of the Interior attempted to negotiate with the private landowners to secure public access to the reservoir (Pet. App. vii to viii). When these negotiations failed, the Department decided to improve and partially relocate an existing dirt road in order to provide public access to the reservoir from a nearby public highway (Pet. App. viii). In late 1973, the Bureau of Land Management began to clear the vegetation in order to mark out this dirt road.

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[1] A plat of the area is attached to the opinion of the court of appeals (Pet. App. xviii).

The road was located to run wholly within the even-numbered sections of public domain, except at two points where it crossed the corners of petitioners' sections as they joined the interlocking public sections (Pet. App. viii to ix, xviii).

Petitioners then brought this action against the United States and several of its officers for declaratory and injunctive relief under the Quiet Title Act, 28 U.S.C. 2409a, contending that the United States had unlawfully entered their property by clearing a pathway across their land at the section corners (Pet. App. vi).[2] The United States in response acknowledged clearing the path and claimed it had the legal right to do so (*ibid.*). Both sides stipulated the facts and moved for summary judgment (Pet. App. vi to vii).

The district court granted summary judgment for petitioners, holding that the United States had not reserved or obtained any easement or other right to cross petitioners' lands for access to its own lands or the reservoir (Pet. App. iv to v).

The court of appeals reversed, with one judge dissenting (Pet. App. vi to xx). It held that the 1862 congressional grant of the odd-numbered sections to petitioners' predecessor in interest, the railroad, was subject to the implied reservation of an easement "to

[2] Petitioners also challenged the determination by the Department of the Interior not to prepare an environmental impact statement for the road project (see Pet. App. iii to v). Neither the district court nor the court of appeals reached the question whether the National Environmental Policy Act required such a statement, and the question is not before this Court.

permit access to the even-numbered sections which were surrounded by lands granted the railroad" (Pet. App. xi). The Court reasoned that if Congress had not reserved a right of access, "then the grant of the odd-numbered sections rendered inaccessible the interlocking even-numbered sections," a result that would have thwarted the congressional purpose of encouraging settlement near the railroad (*ibid.*). The consequence would be that "Congress not only granted the railroad the odd-numbered sections, but also granted the railroad the exclusive use of the even-numbered sections" (*ibid.*). The Court was "unable to conclude that such was the intent of Congress" (*ibid.*). The court found support for its conclusion in several decisions of this Court and other courts and in congressional enactment of the Unlawful Inclosures of Public Lands Act of 1885, ch. 149, 23 Stat. 321, as amended, 43 U.S.C. 1061-1066 (Pet. App. xi to xvi).

In a brief supplemental opinion denying rehearing, the court rejected petitioners' contentions that the issue of an implied reservation had not been properly raised and that it presented a question of fact on which the trial court should conduct an evidentiary hearing (Pet. App. xxvi to xxvii).

INTRODUCTION AND SUMMARY OF ARGUMENT

It has been estimated that in the era of the railroad grants Congress granted more than 131 million acres of public lands either directly to the various railroads or to the states for disposition to the railroads. P. Gates, *History of Public Land Law Development* 379,

384-385 (1968). Virtually all of the railroad grants, like those in this case to the Union Pacific, were made in a checkerboard pattern. The odd-numbered sections were granted to the railroads, and the even-numbered sections were retain l as part of the public domain. Because of the interlocking pattern, the retained public sections were surrounded on all sides by granted sections.[3] Consequently, it was not possible to enter or leave the public sections without passing over some portion of a section granted to a railroad.[4] The even-numbered sections that Congress retained amounted to more than one hundred million acres.[5]

No right of way over the granted lands for access to the retained lands was reserved expressly in the Union Pacific Act—or, to our knowledge, in any of the other railroad grant enactments. Petitioners rely

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[3] The checkerboard pattern was not always complete, since in some cases the lands adjacent to the right of way were not available, and other lands farther from the new rail line were selected in their place. But the checkerboard pattern, as exemplified in this case, was the general rule.

[4] It was also true, of course, that the granted sections were surrounded by retained sections. But the owners of the granted sections could readily obtain access to them across the retained sections by virtue of the federal policy permitting the construction of roads and highways across the public lands. See note 7, *infra*.

[5] The number of even-numbered sections retained in the public domain was less than the number of odd-numbered sections granted because, for one thing, in most cases either section 16 or section 36 of each township was reserved for public schools. See P. Gates, *History of Public Land Law Development, supra*, at 358.

on the silence of Congress as establishing that it did not intend to reserve any right of access. Since this conclusion requires, in the words of the court of appeals, ascribing to Congress an unwarranted "degree of carelessness or lack of foresight" (Pet. App. xi), petitioners explain that Congress "no doubt assum[ed] that any access impediment that did in fact occur could have easily been remedied by exercise of the sovereign power of eminent domain" (Br. 18).

We submit that it is virtually inconceivable that Congress intended to give up the government's right of access to the retained sections, and no less inconceivable that Congress intended to require the institution of thousands of eminent domain proceedings before government agents or government grantees could enter any of the one hundred million acres of checkerboard public lands without trespassing on railroad lands. Such a contention is so unreasonable that it should not be adopted unless compelled by the clearest evidence of legislative intent.

There is no such evidence. Petitioners argue that the record is silent, but in fact it demonstrates that Congress's plan for the development of the retained public lands required a reserved right of way. Congress intended to recoup the value of the lands granted to the railroads from the enhanced value of the retained public sections resulting from the development of the rail lines. These retained sections were to be sold for double the minimum price usually charged for public lands. This plan depended on access to the public sections, and it is irreconcilable

with petitioners' contention that Congress did not intend to reserve a right of access.

In these circumstances, the court of appeals correctly concluded that such a right of way was impliedly reserved because the intent to do so was manifest in the pattern of the grants. In private conveyances, the grantor's intent to reserve a right of access is presumed when he conveys lands completely surrounding property that he retains. The same principle applies to congressional grants.

Although there has been little litigation on the question, the clear majority of decisions are in accord with the decision of the court of appeals here. And this Court's decision in *Camfield* v. *United States*, 167 U.S. 518 (1897), rejects petitioners' contention that the silence of Congress established its intention to allow the grantees of the railroad sections to control the access into the retained public sections. The administrative interpretations of the Act are likewise consistent with our view.

Recognition of this reserved right of access will not throw into question title to the lands granted to the railroads, nor place any undue burden on the railroads or their grantees. The government claims only the limited right of access that was implicit in the plan of the checkerboard grants. The access way must be located so as to minimize the burden on the railroad grant lands. The right is limited by the principles of minimum intrusiveness that are well established in the context of common law easements

of necessity. And once the area is developed and other means of access made available, the implied right of access is no longer enforceable since it is no longer necessary.

ARGUMENT

I. CONGRESS IMPLICITLY RESERVED A RIGHT OF ACCESS WHEN IT GRANTED TO THE RAILROADS THE ODD-NUMBERED SECTIONS SURROUNDING THE RETAINED SECTIONS OF THE PUBLIC DOMAIN

A. Under Settled Rules Of Property Law, The Intent To Reserve A Right Of Access Was Implicit In The Grant Of Lands Completely Surrounding The Retained Sections

It is well settled that if a private landowner conveys to another a portion of his lands, retaining other lands completely surrounded by the granted lands, he is presumed to have reserved a right of access over the granted lands for ingress to, and egress from, his landlocked property. 3 R. Powell, *The Law of Real Property* ¶ 4.10, at 430-432 (rev. ed. 1977); 2 G. Thompson, *Commentaries on the Law of Real Property* § 362, at 410-424 (1961 ed.); *Restatement of the Law of Property*, §§ 474-476 (1944).[6] Such rights of way, also called easements by necessity, have been uniformly recognized despite the general rule in construing private conveyances that

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[6] See, *e.g.*, *Harris* v. *Gray*, 28 Tenn. App. 231, 188 S.W.2d 933 (1945); *Hoffman* v. *Shoemaker*, 69 W.Va. 233, 71 S.E. 198 (1911); *Jay* v. *Michael*, 92 Md. 198, 48 A. 61 (1900); *Meredith* v. *Frank*, 56 Ohio St. 479, 47 N.E. 656 (1897).

doubts are resolved in favor of the grantee and against the grantor, who is not permitted to derogate from the terms of the grant. See 3 R. Powell, *supra*, ¶ 4.10, at 431; *Restatement of the Law of Property*, *supra*, at § 476 Comment c.

Since the implicit intent to reserve a right of access to retained lands is recognized in private conveyancing, a fortiori the same intent must be recognized in the case of the congressional railroad grants. For "[i]t has long been established that, when grants to federal land are at issue, any doubts 'are resolved for the Government, not against it.'" *Andrus* v. *Charlestone Stone Products Co.*, 436 U.S. 604, 617 (1978), quoting *United States* v. *Union Pacific R. Co.*, 353 U.S. 112, 116 (1957). We do not contend that an easement of necessity was created here without regard to Congress's intent. The legislative grant of public lands is a statute as well as a conveyance, and must be construed to carry out Congress's intent. *Missouri, Kansas, and Texas Ry.* v. *Kansas Pacific Ry.*, 97 U.S. 491, 497 (1878); *Schulenberg* v. *Harriman*, 88 U.S. (21 Wall.) 44, 62 (1874). But the foundation of the common law rule of easements by necessity—the recognition that, in the absence of inescapable evidence to the contrary, a grantor necessarily intends to reserve a right of way where that is essential for access to his remaining property—is equally applicable to congressional grants. Under this settled rule of property law, Congress's intent to reserve a right of access to the landlocked public sections was manifest in its act of granting the surrounding sections of land to the railroads.[7]

[7] Petitioners argue (Br. 10 n.5) that if an easement of necessity "were to be implied in favor of the sovereign, it would have to be reciprocally implied in favor of every grantee from the sovereign and his successors with respect to the surrounding public lands." As petitioners note (*ibid.*), several state courts have refused to imply easements of necessity in favor of grantees from the sovereign. See, *e.g.*, *Guess* v. *Azar*, 57 So.2d 443, 445 (Fla. 1952); *Pearne* v. *Coal Creek M. & M. Co.*, 90 Tenn. 619, 627-628, 18 S.W. 402, 404 (1891). As the court explained in *Guess* v. *Azar* (57 So.2d at 444-445):

> In Jones on Easements, page 247, we find the reason for the rule that where the state is the common source of title the right to a way of necessity does not arise. It is said there that "By public statutes she provides for the establishment and maintenance of public roads, penetrating every neighborhood and sufficiently numerous to meet the general wants of her citizens. * * * It would be ruinous to establish the precedent contended for, since by it every grantee from the earliest history of the State, and those who succeed to his title, would have an implied right of way over all surrounding and adjacent lands held under junior grants, even to the utmost limits of the State."

No issue is presented in the present case regarding any asserted rights of the railroads and their grantees to cross the retained government lands; indeed, petitioners have the use of the adjoining public sections pursuant to Taylor Grazing Act permits. We note, however, that it was not necessary for Congress to grant the railroads a right of way across the retained public sections. The owners of the odd-numbered sections were able to develop them without impediment because of the federal policy, well established prior to the passage of the railroad grant acts, permitting the construction of roads and highways across the public lands. Section 8 of the Act of July 26, 1866, ch. 263, 14 Stat. 253, which provided that "[t]he right of way for the construction of high-

B. The Alternative Suggestion That Congress Intended To Exercise The Power Of Eminent Domain To Regain The Right Of Access To The Retained Public Lands Is Unreasonable And Unworkable

In arguing that Congress's silence establishes its failure to reserve a right of access to the retained public sections, petitioners rely on the claim that Congress "no doubt assum[ed] that any access impediment that did in fact occur could have easily been remedied by exercise of the sovereign power of eminent domain" (Br. 18). As petitioners construe the railroad grant acts, then, before any officer, agent, grantee, or licensee of the federal government could enter on the more than one hundred million acres of retained public lands without trepassing on some portion of the lands granted to the railroads, it was necessary for the federal government to exercise the power of eminent domain. On this theory, thousands upon thousands of separate eminent domain actions were a prerequisite to development of the public sec-

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ways over public lands, not reserved for public uses, is hereby granted," was "a voluntary recognition and confirmation of preexisting rights, brought into being with the acquiescence and encouragement of the general government." *Central Pacific Ry. Co.* v. *Alameda County*, 284 U.S. 463, 473 (1932); M. Clawson and B. Held, *The Federal Lands* 50 (1957). (Section 8 was repealed by Section 706 of the Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, 90 Stat. 2793, and the acquisition of rights of way across public lands is now governed by Title V of that Act, 43 U.S.C. 1761 *et seq.*) Accordingly, we do not agree with amicus Energy Transportations Systems Inc. (Br. 28-33), which urges that easements in favor of the railroad grantees should be recognized.

tions—or, indeed, to entrance to or exit from those sections.

It is inconceivable that Congress intended to overwhelm the federal government and the state, federal, and territorial courts with that volume of eminent domain proceedings.[8] Such an unreasonable and unworkable construction of the public land laws should not be adopted unless the legislative history compels it.

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[8] The authority of the United States to bring eminent domain proceedings in the federal courts, or in state courts without the state's consent, was not settled at the time of the Union Pacific grants. Although it was generally conceded that the United States could bring eminent domain proceedings in state courts with the consent of the state, it was argued that the United States, a government of limited delegated powers, lacked the authority to institute eminent domain proceedings without state consent, since no power of eminent domain was expressly granted in the Constitution. 1 *Nichols on Eminent Domain* ¶ 1.24 (3d ed. 1976). The federal power of eminent domain was clearly established by this Court's decision in *Kohl* v. *United States*, 91 U.S. 367 (1875).

One of the chief reasons for the passage of the Unlawful Inclosures of Public Lands Act of 1885, ch. 149, 23 Stat. 321, as amended, 43 U.S.C. 1061 *et seq.*, which authorized private actions to abate unlawful enclosures preventing passage over the public lands, was the lack of government personnel and funds to compile legal descriptions of the enclosed lands and to bring actions to abate the obstruction. H.R. Rep. No. 1325, 48th Cong., 1st Sess. 4-5 (1884). Governments suits to condemn rights of way into each of the retained public sections would have been equally infeasible.

C. The Legislative History Provides No Support For The View That Congress Intended To Require The Widespread Exercise Of The Power Of Eminent Domain Before There Could Be Settlement Or Development Of The Millions Of Acres Of Retained Lands. Rather, The Legislative History Demonstrates That Congress's Plan For The Development Of The Retained Public Lands Required A Reserved Right Of Way

There is no legislative history supporting petitioners' argument that Congress intended to use the power of eminent domain to regain access to the millions of acres of retained public sections in the checkerboard. Indeed, petitioners urge only that the legislative history is silent—that "there was no discussion of the access question in any congressional debate or report" (Br. 18).[9] What the legislative

[9] There is no substance to the suggestion of amici Union Pacific Land Resources Corporation, et al. (Br. 11-12) that amendments to reserve a right of access to the retained public lands were proposed and defeated during the consideration of both the Union Pacific Act and its 1859 precursor. In considering the Union Pacific Act, Congress rejected a proposal to reserve from the lands granted to the railroads not only mineral lands (as was done in the Act), but also any minerals later found on granted lands and a public right to enter the railroad lands to work claims to those minerals. Cong. Globe, 37th Cong., 2d Sess. 1909-1910 (1862). Nothing was said, either favorably or unfavorably, about a general right of access.

In the portion of the 1859 debates cited by amici (Br. 12 n.12), Senator Simmons objected to the necessity of allowing railroad corporations to condemn private land where the right of way went through settled areas, and he concluded (Cong. Globe, 35th Cong., 2d Sess. 579 (1859)):

> [A]lthough I have always voted for these improvements, I have always regretted the necessity of having to let these private enterprises trample upon the rights of the owners of property. I would not permit any Government in the world to invade the rights of the people within the Territories of the United States, but the Government of the United States. We ought to take care of their rights. Here is a range on this route of some fourteen hundred miles through the Territories of the United States, several hundred of which are thickly settled, and we propose to let the dogs loose and tie the stones down; to let these people go in and take their property without any provision for their security. This Government ought to take care of them, and ought to be liberal with them, and if this proposition prevails, I hope that from this time onward there will be a reservation in every grant of land that we shall have a right to go through it, and take it at proper prices to be paid hereafter. Under the original bill, however, if the contract proposed to be made, shall be entered into, you cannot alter it. It presents to my mind a very dangerous experiment. If, however, the Government undertake to do this work and do it wisely, they can do justice by every man who owns a foot of land on the whole route, and we ought to guard it properly.

Although the exact nature of Senator Simmons' proposal (which apparently received no further discussion) is not clear, it does not deal with the reservation of a right of access across the lands granted to the railroads to reach the retained public lands.

history does reveal is that an important purpose of the congressional grants to the railroads was to enhance the value of the retained public lands. Since the accessibility of these lands was a prerequisite to their settlement, Congress's plan required a reserved right of way across the railroad lands.

As this Court has previously recognized, the primary purpose of the grants to the Union Pacific "was to obtain the construction of the railroad by the cor-

poration created to undertake the work." *Platt* v. *Union Pacific R.R. Co.*, 99 U.S. 48, 60 (1878). At the time of the 1862 grant, the Civil War was in progress, and there was concern that the federal government might be cut off from its western possessions. The construction of a transcontinental railroad was intended to "bind together the widely separated parts of our common country, and furnish a cheap and expeditious mode for the transportation of troops and supplies." *United States* v. *Union Pacific R.R. Co.*, 91 U.S. 72, 80 (1875). But in addition to the military need for the railroad, "there were other reasons active at the time in producing an opinion for its completion" (*ibid.*):

> There was a vast unpeopled territory lying between the Missouri and Sacramento Rivers which was practically worthless without the facilities afforded by a railroad for the transportation of persons and property. With its construction, the agricultural and mineral resources of this territory could be developed, settlements made where settlements were possible, and thereby the wealth and power of the United States largely increased; and there was also the pressing want, in time of peace even, of an improved and cheaper method for the transportation of the mails, and of the supplies for the army and the Indians.

Despite the potential benefits of rail lines through the West, efforts to gain support in Congress for large-scale land grants for this purpose were for a long time unsuccessful. Many early bills to grant

lands to railroads were defeated; Congress objected not only to granting away large portions of the public domain, but to doing so in aid of "internal improvements," a controversial constitutional issue of the day. J. Sanborn, *Railroad Land Grants, XII Transactions of the Wisconsin Academy of Sciences, Arts, and Letters* 306-309 (1898). Cf. *United States* v. *Union Pacific R.R. Co., supra,* 91 U.S. at 80.[10] These objections were ultimately overcome by the argument, first advanced by Stephen Douglas in connection with a bill to grant lands to the Illinois Central Railroad, that by retaining one half the lands along the new rail lines for sale after the completion of the line, the United States as landowner could reap the benefits of the economic growth and development promoted by the railroads. Cong. Globe, 31st Cong., 1st Sess. 845 (1850). The Illinois Central grant, ch. 61, 9 Stat. 466 (1850), which became the model for all succeed-

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[10] It was argued that the power to construct internal improvements, other than post roads, was not among Congress's enumerated powers and had been left to the states. On this constitutional theory, in 1830 President Jackson vetoed a bill authorizing the construction of a road to Maysville. His veto message of May 27, 1830, reproduced in 2 J. Richardson, *A Compilation of the Messages and Papers of the Presidents 1789-1897* 483-493 (1896), discusses the views of previous administrations on this question. The fifth edition of Story's constitutional treatise describes the question of the power of Congress to authorize internal improvements as one "which has for a long time agitated the public councils of the nation," and concludes that "[i]n the present state of the controversy * * * the reader must decide for himself upon his own views of the subject." 2 J. Story, *Commentaries on the Constitution of the United States* 166, 169 (5th ed. 1891).

ing railroad grant legislation, reserved every other section within six miles of the rail line and provided that these sections should be sold for no less than double the minimum price normally charged for public lands.

One scholar has described the theory of the provisions for the sale of the retained sections at double the minimum prices as follows (J. Sanborn, *supra*, at 309):

> These provisions were largely a result of the political theories of the time regarding internal improvements and the public lands. The words "internal improvements" had been sufficient to frighten any politician since Jackson's veto of the Maysville road bill in 1830. Then the great value of the public domain, "the heritage of the people," had long been impressed on Congressmen. It was manifestly impossible to grant the public lands to aid the construction of a railroad. To obviate this difficulty, to enable the United States to both eat and keep its cake, the "land owner" theory of the grants was evolved. This theory was as follows: The United States, a great land owner, has large tracts of unsalable land. Acting as a prudent land owner it will donate half of these lands to a railroad, the construction of which will render the remaining half salable, and, by doubling the price of the remaining lands, will lose nothing by the transaction.[1] This was not internal improvements—even the logical Calhoun could find no hint of such a thing in the plan.[2]

[1] "The Federal Government is a great landholder; it possesses an extensive public domain . . . We may bestow them [the public lands] for school purposes, or we may bestow a portion of them for the purpose of improving the value of the rest." Lewis Cass, *Globe*, 1st Sess., 30th Cong., App., p. 536.

[2] "I do not think that there is a principle more perfectly clear from doubt than this one is. It does not belong to the category of internal improvements at all." Ibid., App., p. 537.

Congress thus sought to promote the transcontinental rail lines, both for military purposes and to foster the settlement of the West, and then to recoup the cost of the grants to the railroads by selling the retained lands at double the minimum price. This plan was necessarily premised on the understanding that those lands were accessible for prompt entry and settlement. Petitioners' contention that Congress provided no means for lawful entry onto any of these lands—unless and until the power of eminent domain had been exercised, section by section—is incompatible with the congressional scheme."[11]

[11] By reasoning similar to that which requires a reserved right of access here, this Court has long recognized that "when the Federal Government withdraws its land from the public domain and reserves it for a federal purpose, the Government, by implication, reserves appurtenant water than unappropriated to the extent needed to accomplish the purpose of the reservation." *Cappaert* v. *United States*, 426 U.S. 128, 138 (1976). "Where water is necessary to fulfill the very purposes for which a federal reservation is created, it is reasonable to conclude, even in the face of Congress' express deference to state water law in other areas, that the United States intended to reserve the necessary water." *United States* v. *New Mexico*, No. 77-510 (July 3, 1978), slip op. 6. Under the

II. RECOGNITION OF A RESERVED RIGHT OF ACCESS IS CONSISTENT WITH THE PRIOR CASES AND WITH THE ADMINISTRATIVE PRACTICE AND CONSTRUCTION OF THE RAILROAD GRANT ACTS

A. Most Of The Applicable Cases Have Recognized That Congress Impliedly Reserved A Right Of Access In Making The Railroad Grants

Although the issue has provoked relatively little litigation, the clear majority of the decided cases are in accord with the decision of the court of appeals here. A number of courts have recognized that in granting the odd-numbered sections surrounding the retained public sections in the checkerboard pattern, Congress manifested an implicit intent to reserve a right of access to the retained public lands. *Jastro* v. *Francis*, 24 N.M. 127, 172 P. 1139 (1918); *Herrin* v.

Union Pacific Act, as soon as the exact location of the railroad's route had been determined, it was filed with the Secretary of the Interior, who was then required to withdraw the land within 25 miles on either side of the right of way from preemption, private entry, and sale, so that the railroad could select its grant lands from those available. 12 Stat. 493, as amended, 13 Stat. 358. The withdrawal included the even-numbered sections that would be retained in the public domain. See *ibid.* As under the doctrine of reserved water rights, it is reasonable to conclude that when the federal government retained the even-numbered sections for the purpose of sale to persons who would settle and develop that land (see pages 15-19, *supra*), while simultaneously granting the odd-numbered sections to the railroad, it reserved a right of access to the even-numbered sections that was "necessary to fulfill the very purposes" for which the lands were retained.

Sieben, 46 Mont. 226, 127 P. 323 (1912);[12] *United States* v. *Buford*, 8 Utah 173, 30 P. 433 (1892), writ of error dismissed, 154 U.S. 496 (1893). Cf. *H.A. & L.D. Holland Co.* v. *Northern Pacific Ry. Co.*, 214 F. 920, 926 (9th Cir. 1914); *Northern Pacific Ry. Co.* v. *Cunningham*, 89 F. 595, 596 (S.D. Wash. 1898); *Hecht* v. *Harrison*, 5 Wyo. 279, 40 P. 306, 307 (1895). Contra, *Anthony Wilkinson Live Stock Co.* v. *McIlquam*, 14 Wyo. 209, 83 Pac. 364 (1905); *United States* v. *Douglas-Willan Sartoris Co.*, 3 Wyo. 287, 22 P. 92 (1889). In *Herrin* v. *Sieben*, *supra*, the court construed the intent of Congress in enacting the grant to the Northern Pacific Railroad, Act of July 2, 1864, ch. 216, 13 Stat. 356, as follows (127 P. at 328-329):

> The grant by the federal government to the railway company, so far as the question at issue is concerned, does not differ from a grant by one private person to another. It is impossible

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[12] *Herrin* v. *Sieben* was overruled in part by *Simonson* v. *McDonald*, 131 Mont. 494, 311 P.2d 982 (1957), which held that reserved easements of necessity had been abolished in Montana where eminent domain was available to acquire the claimed way. *Simonson* overruled *Herrin* insofar as *Herrin* recognized the implied easement doctrine in situations where the condemnation statute applied. 311 P.2d at 986. *Simonson* was in turn limited to its facts in *Thisted* v. *Country Club Tower Corp.*, 146 Mont. 87, 103, 405 P.2d 432, 440 (1965) ("there can be implied reservations or implied grants of easement by necessity in Montana, and insofar as the holding in *Simonson* v. *McDonald* * * * states to the contrary we must observe that the language therein used was too broadly put and should have been limited in its application to the facts existent in that case.").

to gain access to the even-numbered sections belonging to the government except by going over some portion of the odd sections. It must follow that there is an implied reservation by the federal government of a way of necessity, not only in favor of the government itself for access to these sections for any use to which it may wish to devote them, but also in favor of the private citizens who wish to go upon them for the purpose of making settlements thereon, or to cut timber when they may lawfully do so, or to explore them for mineral deposits, or, finally, to use them for grazing purposes. The contrary view would vest in the railway company a monopoly of all the public lands within the limits of the grant. * * * If the surface is such as to permit it, a way of reasonable width from one government section to another should be fixed in each case at the point where the corners join. If because of the broken character of the surface this should be ascertained not to be practicable in any instance, then another way should be selected of such width as may be necessary.

B. This Court's Decision In *Camfield* v. *United States* And Lower Court Decisions Construing The Unlawful Inclosures Act Provide Additional Support For The Court Of Appeals' Construction Of The Railroad Grants

This Court's analysis in *Camfield* v. *United States*, 167 U.S. 518 (1897), supports the decision of the court of appeals. The question presented in *Camfield* was whether a fence constructed by the petitioners, successors in title to odd-numbered sections granted to the Union Pacific, violated Section 3 of the Unlawful Inclosures of Public Lands Act, ch. 149, 23 Stat. 322, 43 U.S.C. 1063, which provides:

> [N]o person, by force, threats, intimidation, or by any fencing or inclosing, or any other unlawful means, shall prevent or obstruct * * * free passage or transit over or through the public lands * * *.[13]

The petitioners contended that their fence, although it had the effect of enclosing the even-numbered sections of the public domain land within its perimeter, was lawful because it was constructed wholly on their odd-numbered sections. (See the diagram at 167 U.S. 520.) The Court concluded, however, that the fence violated the Unlawful Inclosures Act because it

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[13] The Unlawful Inclosures Act itself affords an additional indication of Congress's intention to reserve a right of access permitting entry onto and use of the retained public domain sections. By its terms, the Act created no new rights or interests. Rather it was remedial legislation to facilitate the enforcement of rights Congress had previously reserved. See 15 Cong. Rec. 4772 (1884). See *Western Wyoming Land & Live Stock Co.* v. *Bagley*, 279 F. 632 (8th Cir. 1922); *Stoddard* v. *United States*, 214 F. 566 (8th Cir. 1914); *Golconda Cattle Co.* v. *United States*, 201 F. 281 (9th Cir. 1912), rev'd on other grounds on rehearing, 214 F. 903 (1914); *Lillis* v. *United States*, 190 F. 530 (9th Cir. 1911); *Homer* v. *United States*, 185 F. 741 (8th Cir. 1911). Such subsequent legislation may properly be considered in determining the intent of an earlier statute. *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 380-381 (1969). In *Northern Pacific Ry. Co.* v. *Cunningham*, 89 F. 595, 598 (S.D. Wash. 1898), the court expressly acknowledged the existence of an easement in favor of the public to reach the even-numbered sections, although it ruled against the defendant because he had exceeded the scope of the easement and depastured plaintiff's land.

cut off access to the public sections. This conclusion was bottomed on the Court's rejection of the contention, advanced again by petitioners in this case, that Congress's failure to reserve an express right of way must be conclusive (167 U.S. at 526):

> We are not convinced by the argument of counsel for the railway company, who was permitted to file a brief in this case, that the fact that a fence, built in the manner indicated, will operate incidentally or indirectly to enclose public lands, is a necessary result, which Congress must have foreseen when it made the grants, of the policy of granting odd sections and retaining the even ones as public lands; and that if such a result inures to the damage of the United States it must be ascribed to their improvidence and carelessness in so surveying and laying off the public lands, that the portion sold and granted by the Government cannot be enclosed by the purchasers without embracing also in such enclosure the alternate sections reserved by the United States. Carried to its logical conclusion, the inference is that, because Congress chose to aid in the construction of these railroads by donating to them all the odd-numbered sections within certain limits, it thereby intended incidentally to grant them the use for an indefinite time of all the even-numbered sections. It seems but an ill return for the generosity of the Government in granting these roads half its lands to claim that it thereby incidentally granted them the benefit of the whole.[14]

[14] Compare the Court's dictum, 167 U.S. at 527-528. Petitioners place considerable reliance on this dictum (Br. 36), but we read it as indicating at most that intent is an element of the criminal offense under the Unlawful Inclosures of Public Lands Act. Compare *Golconda Cattle Co.* v. *United States*, 201 F. 281 (9th Cir. 1912), rev'd on other grounds on rehearing, 214 F. 903 (9th Cir. 1914), with *Homer* v. *United States*, 185 F.2d 741, 745-746 (8th Cir. 1911).

Of course, petitioners here did not erect a fence around the perimeter of their checkerboard land holdings. But their refusal to allow access over any corner of their land in order to reach the interlocking sections of public domain operates effectively as an enclosure of those public lands. As the court of appeals pointed out in *Mackay* v. *Uinta Development Co.*, 219 F. 116, 118 (8th Cir. 1914), in upholding the right of sheepherders to cross private lands when passing from summer to winter range:

> The odd-numbered sections touch at their corners and their points of contact, like a point in mathematics, are without length or width. If the position of the company were sustained, a barrier embracing many thousand acres of public lands would be raised, unsurmountable except upon terms prescribed by it. Not even a solitary horseman could pick his way across without trespassing. In such a situation the law fixes the relative rights and responsibilities of the parties. It does not leave them to the determination of either party. As long as the present policy of the government continues, all persons as its licensees have an equal right of use of the public domain, which cannot be denied by interlocking lands held in private ownership.

The court of appeals concluded that the sheepherders were entitled to "a reasonable way of passage" across the privately owned land. *Id.* at 120.

This Court reached a similar result in *Buford* v. *Houtz*, 133 U.S. 320 (1890). In that case, the Court refused to enjoin sheepherders from moving their sheep across private checkerboard lands to the public domain. The Court held that "there is an implied license * * * that the public lands of the United States * * * shall be free to the people who seek to use them where they are left open and unenclosed." 133 U.S. at 326.

C. The Decisions Cited By Petitioners Are Not To The Contrary

There is no merit to petitioners' contention (Br. 10-12, 21-22) that this Court's decision in *Missouri, Kansas, and Texas Ry.* v. *Kansas Pacific Railway Co.*, 97 U.S. 491 (1878), and *Railroad Co.* v. *Baldwin*, 103 U.S. 426 (1880), foreclose the conclusion that Congress intended the reservation of a right of access which it did not expressly state. Neither of those authorities sheds light on the question whether a reserved right of access to retained landlocked sections is implicit in a checkerboard pattern where it is necessary to effectuate the purpose of both the grants and the retention.

In the *Kansas Pacific* case, two railroads claimed conflicting title to 90,000 acres of land under different congressional grants permitting each to locate its route through the lands in question. The Court rejected the claim that Congress had intended, in making the earlier grant in the Union Pacific Act, to reserve lands that might be selected by other railroads under subsequent congressional grants (97 U.S. at 498-499). The Court held that "[t]he rights of the contesting corporations to the disputed tracts are determined by the dates of their respective grants, and not by the dates of the location of the routes of their respective roads * * *." 97 U.S. at 501.

In *Railroad Co.* v. *Baldwin*, the Court considered the conflicting claims of the railroad and a homesteader who settled in 1869 on lands selected by the railroad for its right of way under the Act of June 23, 1866, ch. 212, 14 Stat. 210. The Court concluded that the Act excluded from the section grants to the railroad any odd-numbered sections to which a preemption or homestead right had attached prior to the date the location of the right of way was fixed. 14 Stat. 210. The railroad was expressly authorized to select other lands in lieu of those so excluded. In contrast, no such exception had been stated in the section of the Act granting the right of way, and the Court concluded that none was intended. The Court reasoned that Congress intended the grant of the right of way, unlike the grant of the odd-numbered sections, to be absolute and in praesenti, since allowing the railroad to select other lands if homesteaders settled on the right of way would impede the completion of the line. 103 U.S. at 430.

Neither *Kansas Pacific* nor *Baldwin* weighs against the proposition we assert here, which is that the reservation of a right of access to reach the retained public sections was implicit in the granting of sections com-

pletely surrounding those retained. Those cases reject the conclusion that Congress silently exempted, *in toto*, certain sections from the operation of the grants in question. Here, there is no dispute as to which sections were granted to the railroad. The only question is whether Congress in granting those sections reserved the right to enter on more than one hundred million acres of other sections that were retained as public lands. Nothing in either *Kansas Pacific* or *Baldwin* gainsays the conclusion that Congress's intent to reserve the necessary right of access was manifest in the plan of the railroad grants.

D. The Act Has Not Been Given A Contrary Administrative Interpretation

Petitioners place heavy reliance (Br. 14-16) on the district court's conclusion (Pet. App. v) that in more than 100 years no federal agency or official claimed that the railroad grants had reserved a right of access to the retained sections. Petitioners also assert (Br. 15) that the Secretary of the Interior "expressly determined nearly a century ago that nothing in either the Union Pacific Act or the Unlawful Inclosures Act permitted the United States to construct roads across the lands granted to the railroads without payment of just compensation * * *."

The 1887 Report of the Secretary of the Interior cited by petitioners provides no support for their contentions; to the contrary, it demonstrates that the Secretary viewed any obstruction by the railroads or their grantees of public passage between the retained

public sections as illegal. The Report includes a description of the government's efforts to enforce the Unlawful Inclosures Act, which the Secretary said were largely successful. 1 *Report of the Secretary of the Interior for Fiscal Year Ending June 30, 1887* 12-13 (1887). The Secretary reported that the only locations where there were still illegal restraints on entry to the public sections were within the checkerboard grant areas (*id.* at 13):

> Only where corporate connivance and prodigal railroad grants came to their assistance have the cattlemen defied the law and rendered powerless the efforts of this Department to correct this abuse.

The Report then described the system of placing fences—like those in the *Camfield* case—wholly on railroad land but encircling many sections of public domain land as a "cunning device for violating the law" (*ibid.*). The Report stated that two prosecutions had been brought under the Unlawful Inclosures Act against railroad grantees who had fences of this variety, but that both prosecutions failed, "largely due, probably, to the presence upon the grand jury of men who were themselves violators in this evasive manner" (*id.* at 14-15).

It was in the context of this discussion of the Interior Department's difficulties in enforcing the right of access to the public sections that the Secretary made the suggestion that where grants had already been made, a strip of land four rods wide around each granted section should be condemned for

the construction of public roads (*id.* at 15): "When the land taken for such highways has passed from the government into the hands of private parties the bill should provide for necessary compensation." This proposal was quite different in scope from the right of access claimed here. The government claims a right of access to the retained sections—in this case, across two corners of petitioners' sections—but it does not claim and never has claimed that it reserved a right of way four rods wide along each side of all the sections granted to the railroads. The Secretary correctly recognized that the lands for such an extensive system of roads would have to be purchased or condemned.

There is simply no evidence to support the district court's conclusion (Pet. App. v) that the government had failed to claim any right of access since the time of the railroad grants. The government brought many enforcement actions under the Unlawful Inclosures Act to remove barriers to free passage.[15] Perhaps more significant, it is beyond question that the government did not, following the passage of the railroad grant acts, embark on a large-scale effort—or, so far as we are aware, any effort at all—to condemn rights of way into the retained public sections

[15] See, *e.g.*, *Camfield* v. *United States*, 167 U.S. 518 (1897); *Stoddard* v. *United States*, 214 F. 566 (8th Cir. 1914); *Cardwell* v. *United States*, 136 F. 593 (9th Cir. 1905); *McKelvey* v. *United States*, 273 F. 410 (9th Cir. 1921), aff'd, 260 U.S. 353 (1922).

in order to permit their development.[16] Yet under petitioners' theory, such an exercise of the right of eminent domain would have been necessary.

III. RECOGNITION THAT CONGRESS RESERVED A RIGHT OF ACCESS DOES NOT PLACE AN UNDUE BURDEN ON THE RAILROAD AND ITS GRANTEES

Recognition of the limited right of access Congress implicitly reserved does not, as petitioners charge (Br. 24), render all patents derived from the railroad grants "uncertain or open to challenge," nor does it place an undue burden on the railroads and their grantees.

As petitioners demonstrate (Br. 24-28), this Court has recognized that a patent provides the documentary evidence that the grantee's title has been perfected and that "all determinations essential to the

[16] Amici Union Pacific Railroad, *et al.* do not contend that there was such a program, but they assert that "[t]he public land records in the West reflect numerous transactions in which the United States has *purchased* easements or similar interests from the private owners of granted lands, including each of the amici" (Br. 18; emphasis in original). As already noted (page 30, *supra*), the United States is obligated to pay just compensation for the taking of any interest that exceeds the limited right of access implicitly reserved when the railroad grants were made. Amici do not claim that any of the purchases to which they refer were purchases of such limited access rights. But even if agents of the government did purchase such rights in some cases, their conduct could not estop the government from now claiming the rights that it reserved. See, *e.g.*, *United States* v. *Stewart*, 311 U.S. 60, 70 (1940).

passing of title have been made." *West* v. *Standard Oil Co.*, 278 U.S. 200, 214 (1929). In the context of the railroad grants, the Court has held that the railroad's patents may not be challenged on the ground that title should not have been granted.[17]

The government does not question the validity of the grants to the railroads or seek to challenge their title or that of their grantees. We seek only to enforce a reservation that was, we contend, implicit in the grants themselves. We claim—and the court of appeals upheld (Pet. App. xi)—only a right of way "to permit access to the even-numbered sections which were surrounded by lands granted the railroad." As we have shown, at common law a private grantor's intent to make such a reservation is recognized as implicit in the act of making the grant, and we have argued that the same intention was manifest in the checkerboard railroad grants, especially since lack of access would have frustrated Congress's intent.

This limited right of access does not place any undue burden on a railroad or its grantees. Since

[17] For example, in *Tarpey* v. *Madsen*, 178 U.S. 215 (1900), the Court held that the railroad's title could not be defeated by a claimant who testified that at the time the railroad filed its route with the General Land Office—the date on which its title could definitely be ascertained—the claimant had been homesteading on lands subsequently patented to the railroad. Likewise in *Burke* v. *Southern Pacific R.R. Co.*, 234 U.S. 669 (1914), the Court held that the reservation of "mineral lands" from the railroad grants (see, *e.g.*, 12 Stat. 492) reserved only lands determined to contain mineral deposits before the railroad received its patents, not lands patented and subsequently found to contain minerals.

implied easements were well known at common law, there is an extensive body of precedent to guide the courts in resolving disputes regarding the location of the government's way of access and the uses to which it may be put. See 3 R. Powell, *The Law of Real Property*, *supra*, at ¶ 416; *Restatement of the Law of Property*, *supra*, at § 474. Where more than an access way or road is required, the government must pay just compensation. The access way must be located, as it was in this case, so as to minimize the burden on the odd-numbered sections. In many cases that will mean a passage over the corners of the odd-numbered sections, but if that is not the minimal intrusion, the access road may be located elsewhere. See *Herrin* v. *Sieben*, *supra*, 127 P. at 328-329, quoted at pages 21-22, *supra*.[18] Furthermore, this right of access, springing from necessity as it does, is no longer enforceable once the lands in question have been developed and roads established. Cf. 3 R. Powell, *The Law of Real Property*, *supra*, at ¶ 422 (easements of necessity terminate when the necessity disappears). For that reason, the right has little, if any, application in settled areas.

There remain in the West today large undeveloped areas containing public lands in the checkerboard pattern. In these areas, denial of the government's right of access to its lands would have a severe adverse

[18] In the words of amici Union Pacific Land Resources Corporation, *et al.* (Br. 28), the right of access "must be limited by principles of minimum intrusiveness such as those applicable to common law easements."

effect, restricting both public use and government administration of a large segment of the public domain. Without a right of access, public hunting, fishing, and other recreational uses would be curtailed. Access to federally leased deposits of coal, oil, and gas resources would be restricted, with development of these resources consequently hindered and lease values impaired. Grazing access for government licensees would also be impeded. Denial of access would interfere with the government's ability to administer its lands, as by enforcing prohibitions against the destruction of natural resources. Even the government's ability to inventory the public lands would be restricted.[19]

In sum, a right of access to the retained sections of public lands was and still is necessary if anyone—

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[19] Indeed Congress recently enacted legislation authorizing the Secretary to "exercise the power of eminent domain only if necessary to secure access to public lands * * *." 43 U.S.C. 1715(a). The Senate committee reports recommending passage of this legislation urged that tracts of public property to which there was no convenient public access were being treated as "virtual private preserves." S. Rep. No. 583, 94th Cong., 1st Sess. 51 (1975). To the extent that this report may be read as suggesting that exercise of the power of eminent domain would be necessary to secure access to public checkerboard lands, we believe that the committee misconstrued the intention of the 37th Congress. We note that the Recommendation of the Public Land Review Commission on which the committee relied does not discuss the question of access to checkerboard public lands. See Public Land Law Review Commission, *One Third Of The Nation's Land* 214-215 (1970). (Although the Senate Committee Report refers to Recommendation 85, the reference is apparently to Recommendation 86.)

other than the owner of the alternate sections granted to the railroads—is to make use of the public sections. That right was reserved by the Congress when it made the grants to the railroads.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

JAMES W. MOORMAN
Assistant Attorney General

STEPHEN R. BARNETT
Deputy Solicitor General

SARA SUN BEALE
Assistant to the Solicitor General

PETER R. STEENLAND, JR.
RAYMOND N. ZAGONE
EDWARD J. SHAWAKER
CHARLES E. BIBLOWIT
Attorneys

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